Supreme Court, U.S.
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No. 99-1093

In The

Supreme Court of the United States

October Term, 1999

JOHN REZZONICO and JACQUELYN REZZONICO,

Petitioners,

-against-

H & R BLOCK, INC and H & R BLOCK EASTERN TAX SERVICES, INC., HRB ROYALTY, INC.
Add as party from consolidated case,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NORMAN A. OLCH
Attorney for Petitioner
233 Broadway
New York, New York 10279
(212) 964-6171

PRINTINGHOUSE PRESS 25 WEST 43 RD STREET NEW YORK, NY 10036 (212) 719-0990

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TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities ii

Reply to Respondents' Opposition . . . 1

A. Rule 77(d) and "Unique Circumstances" 1

B. Law of the Case 3

Conclusion 5

TABLE OF CITED AUTHORITIES

Cases:

Brown v. *Allen*, 344 U.S, 443 (1953) . . 3

Christianson v. *Colt Industries Operating Corp.*,486 U.S. 800(1988) 3

Hollins v. *Department of Corrections*, 191 F.3d 1324 (11th Cir.1999) . . 2

LaShawn A. v. *Barry*, 87 F.3d 1389 (D.C. Cir. 1996)(en banc) 3

Prudential-Bache Securities, Inc. v. *Fitch*, 966 F.2d 981 (5th Cir. 1992) 2, 3

U.S. v. *Ibarra*, 502 U.S. 1 (1991) . . . 1

Other Authorities:

Federal Rule of Appellate Procedure 4(a)(6) 1

Federal Rule of Appellate Procedure 35 4

Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, 134 F.R.D. 698 3

Second Circuit Local Rule 27(i) 4

REPLY TO RESPONDENTS' OPPOSITION

A. *Rule 77(d) and "Unique Circumstances*

Respondents' defense of the ruling below invites confusion for the Bench and Bar. While litigants should not "be required to guess at their peril the date on which the time to appeal commences to run," *U.S.* v. *Ibarra,* 502 U.S. 1, 7 (1991), respondents, and the Second Circuit, offer no principled or workable rule for determining whether or when an attorney can rely on the F.R.Civ.P. 77(d) notice for measuring the date from which the time to file a notice of appeal commences.

Outside the Second Circuit the rule is sensible and workable: a party can rely on a Rule 77(d) notice or other official written communication from the district court clerk's office which is regular on its face. Pet. at 5 and cases cites thereat.

Instead of guidance and a "clear general rule," *U.S.* v. *Ibarra,* 502 U.S. at 7, respondents advance an unprincipled regime in which litigants must "guess at their peril." In such a setting, as this Court has noted in the context of criminal notices of appeal, "prudent attorneys" will file unnecessary notices of appeal, while the "less prudent" will burden the Circuit Courts with litigation on the timeliness of the notice of appeal. "Neither development would be desirable." *Id.*

In this regard, while petitioner has argued that the Second Circuit's approach cannot be harmonized with Federal Rule of Appellate Procedure 4(a)(6), Pet. at 6-7, it is noteworthy that respondents do not address this important rule at all. As the draftsmen have indicated, Rule 4(a)(6) recognizes the reliance parties place on the clerk's 77(d) notice for measuring the time to file a notice of appeal. Pet. at 6 and citations thereat. Outside the Second Circuit such reasonable reliance is recognized and appreciated; respondent and the ruling below, however, eschew litigants' reasonable expectations regarding official written communications from the clerk's office.

And while respondent contends that petitioner has mischaracterized and contorted the case to manufacture a circuit

conflict, Res. Opp. at 1, respondent cannot cite even a single case outside the Second Circuit which supports the outcome below.

Respondent and the Second Circuit maintain that the "unique circumstances" doctrine should not apply because the clerk of the district court is not a "judicial officer" under that doctrine, and because, in any event, the doctrine should apply only where a party has relied upon "truly clerical matters" performed by the clerk's office. Res. Opp at 6. Respondent, however, is careful to omit reference to decisions that because the clerk is disseminating information on behalf of a judge, and because the public relies on the clerk for such information, he is a "judicial officer" for purposes of the "unique circumstances" doctrine. *Hollins* v. *Department of Corrections,* 191 F.3d 1324, 1328 (11th Cir. 1999); *Prudential-Bache Securities, Inc.* v. *Fitch,* 966 F.2d 981, 985-986 (5th Cir. 1992). It is also unclear from respondents' opposition in what way the clerk's notice, which is mandated by Rule 77(d) and can be served only by the clerk, is not a "truly clerical matter."

Finally, respondent argues that petitioner's counsel should not have relied on the second 77(d) notice because the docket sheet entry indicated that the second judgment was entered "to correct clerical error." Res. Opp. at 6. But reference to the docket sheet begs the question of whether a party can rely on the 77(d) notice.

The clerk is not required to send the docket sheet to a party, and he did not do so here. He sent only the 77(d) notice. Requiring a party to also view the docket sheet would defeat the notification scheme under the Federal Rules of Civil Procedure: "[Appellants] were not required to view the actual docket sheet to determine the date of entry of the order. Such a requirement would nullify the notice procedures in Rules 5 and 77 of the Federal Rules of Civil Procedure." *Prudential-Bache Securities, Inc.* v. *Fitch,* 966 F.2d at 986.

Requiring parties to independently examine the docket sheet would also run counter to the conclusions of the draftsmen of the Federal Rules of Appellate Procedure: experience shows that because an increasing number of litigants and their attorneys do not reside near the federal court in which an action is pending,

their growing reliance on the clerk's office and the 77(d) notice is reasonable and is to be expected. Note, *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, 134 F.R.D. 698, 699.[1]

B. *Law of the Case*

Respondents argue at length that even if there is a conflict among the circuits over whether the law of the case applies to jurisdictional determinations of one panel of a circuit court, the law-of-the-case is merely a discretionary matter not worthy of this Court's consideration. Res. Opp. at 12-18. For several reasons respondents' argument is unconvincing.

First, the mere fact that different circuits take different views on whether the law of the case applies to jurisdictional determinations strongly suggests that matters of important principle are at issue. Indeed, respondents have no rejoinder to the D.C. Circuit's observation that the law of the case should be followed in jurisdictional matters because "[i]nconsistency is the antithesis of the rule of law." *LaShawn A.* v. *Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996)(en banc); *Christianson* v. *Colt Industries Operating Corp.,* 486 U.S. 800, 817 (1988)(courts should be "loathe" to depart from the law of the case).

Second, to state that the application of the law of the case is discretionary is the beginning of the inquiry not its conclusion. A court's exercise of discretion is not a lawless enterprise but must be guided by sound and articulated principles appropriate to the case at hand. "Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown* v. *Allen,* 344 U.S, 443, 496 (1953)(Frankfurter, J.). Here, for instance, the jurisdictional record and information before the second panel were exactly the same as that before the first panel. The only discernible difference between the first and second decisions of the court is that three different judges heard the claim the second time.

1

In this case the office of petitioner's counsel was in White River Junction, Vermont, or an approximately 200 miles roundtrip from the courthouse in Burlington, Vermont.

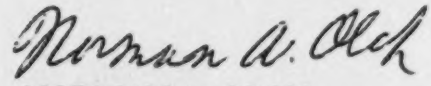
Third, Federal Rule of Appellate Procedure 35 and Second Circuit Local Rule 27(i) both provide for in banc review of panel decisions whether on appeals, motions or other proceedings. In banc review was not sought here. Respondents assert that bypassing the established process to secure three different judges for a second panel should be of no concern to this Court. Res. Opp. 19-20. The claim, however, is inimical to the rule of law and undermines the statutory structure of three-judge panels whose rulings can only be reviewed in banc or by this Court. Pet. at 10.

Finally, jurisdictional decisions are different. If jurisdiction is recognized, as it was here by the first panel, the decision creates the reasonable expectation among litigants that the appeal will be decided on the merits briefs and not on the previously rejected jurisdictional claim.

CONCLUSION

THE PETITION SHOULD BE GRANTED TO RESOLVE (1) THE CONFLICT IN THE CIRCUITS OVER WHETHER A FEDERAL CIVIL APPELLANT CAN RELY ON THE CLERK'S RULE 77(d) WRITTEN NOTICE OF ENTRY OF JUDGMENT TO MEASURE THE TIME WITHIN WHICH TO FILE A NOTICE OF APPEAL; (2) WHETHER THE "UNIQUE CIRCUMSTANCES" DOCTRINE WILL APPLY WHEN A PARTY RELIES ON AN INCORRECT OR MISLEADING RULE 77(d) NOTICE; AND (3) THE CONFLICT IN THE CIRCUITS OVER WHETHER THE LAW OF THE CASE APPLIES TO CIRCUIT COURT JURISDICTIONAL DETERMINATIONS.

Respectfully submitted,



NORMAN A. OLCH
Attorney for Petitioners
233 Broadway
New York, New York 10279
(212)964-6171

February 14, 2000.